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**SEP 28 2009**

**OFFICE OF PETITIONS**

In re Application of  
Heinrich, et al. :  
Application No. 10/534,944 : DECISION ON  
Filed: May 13, 2005 : PETITION  
Attorney Docket No. HM-623PCT :

This is in response to the renewed petition to revive under 37 CFR 1.137(a), filed August 20, 2009.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from the mail date of this decision. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)". Extensions of time under 37 CFR 1.136(a) are permitted.

The above-identified application became abandoned for failure to timely pay the issue fee in response to the Notice of Allowance mailed on January 28, 2009. This Notice set a statutory period for reply of three (3) months. Applicants filed a PTOL-85b Issue Fee Transmittal Form on May 4, 2009, made timely by including a Certificate of Mailing dated April 28, 2009. However, when the Office attempted to charge the fee to counsel's credit card, the credit card was declined. As such, the application became abandoned on April 29, 2009. The Office mailed a Notice of Abandonment on May 28, 2009. Applicants filed a petition to revive under 37 CFR 1.137(a) on June 30, 2009. However, the petition was dismissed without being considered on the merits, because applicants did not submit the petition fee in full, in a decision mailed on July 29, 2009.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c). The instant petition has not satisfied requirement (3) above.

With respect to item (3), decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.<sup>1</sup>

Moreover, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable."<sup>2</sup>

Here, petitioner explains that his credit card company implemented a random computer generated hold, and as such, did not make the funds available to the USPTO. Petitioner is requested on renewed petition to supply a written statement from the credit card company, explaining their hold procedure, as well as confirming that the procedure was implemented on petitioner's

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<sup>1</sup> In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913).

<sup>2</sup> Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

account during the applicable time period.

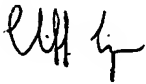
While the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable, petitioner is **not** precluded from obtaining relief by filing a request for reconsideration pursuant to 37 CFR 1.137(b) on the basis of unintentional delay. A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by (1) The reply required to the outstanding Office action or notice, unless previously filed; (2) The petition fee as set forth in 37 CFR 1.17(m); (3) A statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unintentional. The Commissioner may require additional information where there is a question whether the delay was unintentional; and (4) Any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to paragraph (d) of this section.

Further correspondence with respect to this matter should be addressed as follows:

By mail:            Mail Stop Petitions  
                    Commissioner for Patents  
                    P.O. Box 1450  
                    Alexandria VA 22313-1450

By FAX:            (571)273-8300  
                    Attn: Office of Petitions

Telephone inquiries related to this decision should be directed to the undersigned at 571-272-3207.



Cliff Congo  
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Office of Petitions